Supreme Court, U.S.
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No. 95-66

# IN THE SUPREME COURT OF THE UNITED STATES

October Term 1995

**LINCOLN NATIONAL LIFE INSURANCE COMPANY AND EMPLOYERS HEALTH INSURANCE COMPANY,**
*Petitioners,*

**V.**

**ALLEN L. HARDESTER, JR. AND BARBARA HARDESTER,**
*Respondents.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

**David A. Titman, Esquire**
**8339 Court Avenue**
**Ellicott City, Maryland 21043**
**(410) 465-2656**

***Counsel for Respondents***

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

## QUESTION PRESENTED

Should this Court should grant *certiorari* to review the determination that the plain language of a "pre-existing condition exclusion" in plaintiff's health insurance contract did not allow defendants to avoid coverage for the treatment and care of a malignant cancer?

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# BRIEF IN OPPOSITION

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Respondents, Allen L. Hardester, Jr. and Barbara Hardester, respectfully request that this Court deny the petition for writ of certiorari which seeks review of the Fourth circuit's opinion below.

## STATEMENT OF THE CASE

Stripped to its essence, this case involves only a matter of contract interpretation. Because the recitation of facts is crucial to understand the Fourth Circuit's reasoning and the limited nature of its holding, Respondents wish to briefly review the facts of the case and correct some discrepancies between the undisputed record, to which both the various opinions refer, and Petitioners' "Statement of Facts."

In August of 1981, Barbara Hardester was diagnosed with fibrocystic disease. Fibrocystic disease is a "benign condition of the breast marked by fibrous tissue and cyst formation," which may, in some cases, "result in the formation of a firm area in the breast called a mass." Pet. App. at 8a n.1. However, as both the District Court and the panel dissent expressly pointed out, fibrocystic disease "*is not* cancer, and *does not develop* into cancer; indeed, it does no

harm to a woman's physical health at all." Pet. App. at 21a (Hall, J. dissenting) (emphasis in original). *See also* Pet. App. at 29a ("Despite its characterization as a 'disease,' the [fibrocystic] condition is not one which in and of itself causes any deterioration in health. Fibrocystic breast disease does not cause cancer.").

The fibrocystic disease did not manifestly result in any symptoms to Mrs. Hardester until April 17, 1991, when, during Mrs. Hardester's annual gynecological checkup, Dr. Barbara Phillips-Seitz ("Phillips-Seitz") found small masses on both breasts. Petition at 3. However, Petitioners omit from their recitation an important sequence of events following this discovery. Because Dr. Phillips-Seitz' normal practice was to "refer[] 'anybody with a fibrocystic condition' to a surgeon," Pet. App. at 21a n.1 (Hall, J. dissenting), Dr. Phillips-Seitz referred Mrs. Hardester to Dr. Mary Boyle, a surgeon, for further examination. Pet. App. at 9a. After

examining Mrs. Hardester in May 1991, Dr. Boyle concluded that the masses were nothing more than manifestations of the fibrocystic disease. Pet. App. at 9a.

Mrs. Hardester's next annual gynecological checkup occurred on April 6, 1992. During this visit, Dr. Phillips-Seitz found an "clongated ropey mass" on Mrs. Hardester's left breast ("1992 mass"). Again, Dr. Phillips-Seitz referred Mrs. Hardester to Dr. Boyle. Petitioners imply that this referral indicates that Dr. Phillips-Seitz "was more concerned about the possibility of breast cancer that she had been the previous year." Petition at 3. The record indicates, however, that Dr. Phillips-Seitz was simply following her regular procedure and did not suspect the 1992 mass to be cancerous. *See, e.g.,* Petition at 21a n.1 & 29a. In fact, both the District Court and Judge Hall pointed out that had Dr. Phillips-Seitz been concerned about cancer, she would have referred Mrs. Hardester to Dr. Boyle within a day rather than the several

weeks that it actually took. Pet. App. at 21a n.1 and 32a n.3 (if there is "any substantial likelihood" that her patient has cancer, Dr. Phillips-Seitz refers the patient to "a surgeon on that day or the next day.").

On May 1, 1992, at 12:01 a.m., Mrs. Hardester became eligible for benefits under a group health insurance plan issued by the defendants to the employer of her husband. Later that day, Dr. Boyle examined Mrs. Hardester and concluded the 1992 mass was due to the fibrocystic disease. Dr. Boyle then recommended that Mrs. Hardester receive a mammogram because it had been "more than a year" since Mrs. Hardester last had one. Petition at 29a n.1. Mrs. Hardester's mammogram, performed May 7, 1992, turned out negative.

On May 15, 1992, Dr. Boyle removed a mole from Mrs. Hardester's breast. Following that procedure, Dr. Boyle recommended a biopsy of the 1992 mass. After the 1992

mass was removed, doctors found that most of the 1992 mass consisted of fibrocystic disease. However, the fibrocystic mass completely encased a malignant carcinoma that was so small (9 mm across) that it would have avoided detection had it not happened to be encased within the fibrocystic mass. Even though the carcinoma was removed, Mrs. Hardester still had to undergo chemotherapy to prevent recurrence of breast cancer.

Mrs. Hardester then filed a claim for benefits for the surgery and chemotherapy. Petitioners refused to pay on the basis of the policy's pre-existing condition exclusion in the Plan. Under the Plan, a pre-existing condition is any "Sickness or Bodily Injury for which You have received medical attention, (care, treatment, services, medication, diagnosis or consultation)" prior to the effective date of the policy. "Sickness" is defined in three parts: (1) a "disturbance in function or structure of [the] body"; (2)

"which causes physical signs and/or symptoms"; and (3) "which, if left untreated, will result in a deterioration of the health state of the structure or system(s) of [the] body." Pet. App. at 9a. After exhausting Petitioners' internal remedies, Mrs. Hardester, along with her husband, filed suit.

The District Court granted summary judgment to the Hardesters. Holding that the case "can be decided on its own narrow facts," the court ruled that Mrs. Hardester had not received any "medical attention" within the meaning of the policy's language for the breast cancer, and that the fibrocystic disease was not a "sickness" within the meaning of the policy because it did not cause any "deterioration of plaintiff's health." Pet. App. at 31a – 32a.

Reviewing *de novo*, a divided Fourth Circuit panel reversed and remanded with instructions to grant summary judgment to Petitioners. However, in a *per curiam* opinion, the *en banc* Fourth Circuit, by a vote of 7–6, adopted the

reasoning of the panel dissent and ruled that, according to the unique facts of this case, "Mrs. Hardester's breast cancer was not a 'preexisting condition'" under the plain language of the insurance policy. Pet. App. at 23a (Hall, J., dissenting). It is the application of these facts to the insurance contract that Petitioners ask this Court to review.

## REASONS FOR DENYING THE WRIT

This case does not warrant review by this Court for two reasons. First, as Petitioners have conceded in a different context, this dispute is primarily one of fact, and there is no significant legal issue, let alone an important issue of federal law, that would justify the expenditure of this Court's limited time and resources. In addition, any rule of law which this Court might issue would be limited not only to the unique facts of this case, but also to the pertinent language of the insurance contract, which can be changed at any time by Petitioner or any other insurance company.

Second, no inter-Circuit conflict exists. The Courts of Appeals have taken essentially a unified approach when applying pre-existing condition exclusions to undiagnosed illnesses, and the outcomes differ only because each case is applying unique facts to particular policy language.

**A) The Petitioner Presents No Significant Issue Of Federal Law That Would Be Worthy Of The Expenditure Of This Court's Limited Time And Resources.**

Petitioners themselves have recognized that the fact-specific nature of cases such as these means that there is no "significant legal question" to be resolved by any court. In their January 31, 1994 opposition to a motion for attorney fees, Petitioner Lincoln National Ins. Co. wrote:

> [P]laintiff's lawsuit did not raise a "significant" legal question regarding ERISA itself. The dispositive issue in this case was one of fact, not of law. . . . No substantive legal issue under ERISA were {*sic*} raised by either of the parties and none was decided by the Court.

Following the *en banc* ruling, Lincoln National Ins.

Co. again forcefully argued against an award of attorney fees because of the fact-specific basis for the decision. In Lincoln National Ins. Co.'s June 1, 1995 opposition to Hardester's supplemental motion for attorney fees they state:

> [P]laintiffs' complaint did not raise or resolve any significant legal questions regarding ERISA itself. Indeed, the dispositive issue in this case was one of fact, not law. This Court acknowledged that it decided the case "on its own narrow facts." Hardester I, 841 F. Supp. at 716. The dissent in Hardester II (which ultimately was adopted as the opinion of the en banc Court in Hardester III), agreed that "just as (the District Court) resolved the case in Mrs. Hardester's favor on the terms of the clause, so also would I." Hardester II, 33 F.3d at 340.

Thus, this case does not present an "important federal question" as required by Supreme Court Rule 10.

In addition, all three Circuits which have addressed similar circumstances have recognized its duty is to "view the language of the insurance policy to determine where the parties' minds met." *See Bullwinkel v. New England Mut. Life Ins. Co.*, 18 F.3d 429, 432 (7th Cir. 1994). Accord Pet.

App. at 14a. Because the question faced by the courts on this issue is simply a matter of contract interpretation, and because the language of the contracts can be prospectively changed as a result of either bargaining between the two parties or, more realistically, unilateral action by the company, any decision that this Court might render would have little precedential or practical value.

**B) The Decision Below Does Not Conflict With Any Decision Of A Federal Court Of Appeals.**

Contrary to Petitioners' argument, this case does not conflict with *Bullwinkel v. New England Mut. Life Ins. Co.*, 18 F.3d 429, 432 (7th Cir. 1994) (pre-existing condition exclusion covered treatment for a lump/cyst which doctors suspected but could not definitely conclude to be cancerous) and *Kirk v. Provident Life & Acc. Ins. Co.*, 942 F.2d 504, 506 (8th Cir. 1991) (divided panel ruled that pre-existing condition exclusion applied to an aortic valve surgical

replacement that resulted from bacterial endocarditis because insured had manifested symptoms four months prior to surgery which "were consistent with a diagnosis of endocarditis").

All three Circuits understand, first and foremost, that this type of case is simply one of contract interpretation, and that the resolution of the cases hinge on the interpretation of the contract as applied to the specific facts found by the fact-finder. See Pet. App. at 13a ("This case . . . requires us to apply federal common law rules of contract interpretation when interpreting the terms of an employee health insurance policy"); Pet. App. at 32a-33a ("Since the case can be decided on its own narrow facts, I need not decide the broader question it presents"); *Bullwinkel*, 18 F.3d at 430 ("Generally, this case concerns an insurance policy, which is a contract . . . .[The Bullwinkels] and the insurance company disagree on its meaning"); and *Kirk*, 942 F.2d at 505

(interpreting terms of policy). See also *Pitcher v. Principal Mut. Life Ins. Co.*, 870 F.Supp 903, 908 (SD Ind. 1994) ("Because each case is governed by a specific contractual provision, of course, the precedents are of limited value. This case must be decided by applying the specific language of this pre-existing condition clause to this specific factual situation.").

The pre-existing condition clause in *Bullwinkel*, 18 F.3d at 430, defines "sickness" as a "bodily disorder, disease, or mental infirmity or complication of pregnancy". Hardester's policy contains the following underlined qualifier:

> A disturbance in the function or structure of Your body, which causes physical signs and/or symptoms and which, if left untreated, will result in a deterioration of the health state of the structure or system(s) of Your body. Pet. App. at 31a.

Such differences of contract language partially explains the disparate result reached by the circuit court in *Bullwinkel* and *Hardester*. To illustrate, the fibrocystic

condition suffered by Hardester was not a "sickness" under her policy but would have been considered a "sickness" under the Bullwinkel policy. ***Bullwinkel***, 18 F.3d at 431.

The reasoning used by the Fourth Circuit is essentially identical to that used by the Eighth Circuit in ***Kirk*** and the Seventh Circuit in ***Bullwinkel***. In ***Kirk***, the Eighth Circuit upheld the right to coverage exists only when the insured has "some supposedly trivial infirmity or abnormality when the policy took effect," but whose condition later on "changed for the worse and for the first time either actually became, or became diagnosable as, a sickness or disease falling within the coverage of the policy." ***Kirk***, 942 F.2d at 506 (citing ***State Nat'l Life Ins. Co. v. Stamper***, 312 S.W.2d 441, 442 (Ark. 1958)). Similarly in ***Bullwinkel***, the Seventh Circuit, analogizing ***Kirk***, ruled that "even though [the insured] did not know the lump was cancerous in July, her visit with the doctor in that month concerning the lump actually concerned

cancer," and the symptoms which the insured exhibited in July were not "trivial or inconclusive--like a cough or a rash which might imply any of a variety of maladies, or none at all." *Bullwinkel*, 18 F.3d at 432.

Accordingly, the pre-existing condition exclusion applied in *Bullwinkel* and *Kirk* because symptoms, relating to the disease in question, manifested themselves prior to the effective date of the policy. *Kirk*, 942 F.2d at 506. *See also Bullwinkel*, 18 F.3d at 433 (if Bullwinkel's attorney had argued that a lump found to be cancerous in September "could have been caused by any number of maladies other than cancer," the case would have gone to fact-finder). Conversely, since Mrs. Hardester had no underlying symptoms related to cancer and since her cancer was unpalpable and was only discovered when a biopsy found it was coincidentally encased within the fibrocystic mass, under the reasoning of the Seventh and Eighth Circuits, the pre-

existing condition exclusion would not have applied.

In fact, Mrs. Hardester's illness more closely resembles the fact pattern in *Stamper* than in *Kirk*. In *Stamper*, the insured had a small bony growth on the back of her head for most of her life. After her insurance policy became effective, the bony growth began to increase in size and caused her some pain. Because the growth "did not manifest itself as a problem until after the coverage began," the Arkansas Supreme Court ruled that the pre-existing condition exclusion did not apply. *Kirk*, 942 F.2d at 507 (citing *Stamper*, 312 S.W.2d at 442).

Finally, there is no conflict among the three cases because *Bullwinkel* and *Kirk* involve a very different factual pattern. Both *Kirk* and *Bullwinkel* addressed situations where the actual disease, while undiagnosed, caused obvious symptoms that could later be directly attributed to the disease. *See Kirk*, 942 F.2d at 506 ("while there was no objective data

to confirm a diagnosis of endocarditis . . . [the] symptoms were indications that the infection was present") and *Bullwinkel*, 18 F.3d at 432 ("even though Madelaine did not know the lump was cancerous in July, her visit with the doctor in the month actually concerned cancer"). In Mrs. Hardester's case, because "*the undisputed medical record* [indicates that] *there was no causal or associative relationship between the fibrocystic tissue and the carcinoma*," Pet. App. at 25a (Hall, J. dissenting) (emphasis in original), Mrs. Hardester neither knew nor had any reason to know of the existence of cancer." Pet. App. at 33a. Moreover, as the Seventh Circuit explicitly noted in *Bullwinkel*, its discussion is not supposed to be an "authorization for summary judgment in all future cases dealing with pre-existing condition limitations" because of the factual uniqueness of the case. *Bullwinkel*, 18 F.3d at 433. Because all of the Courts that have examined pre-

existing condition clauses recognize the fact-based and contract-dependent nature of the inquiry, there is no conflict for this Court to resolve.

## CONCLUSION

The writ of *certiorari* should be denied.

Respectfully submitted,

David A. Titman, Esq.
8339 Court Avenue
Ellicott City, MD 21043
410/465-2656

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